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No. 89-1634

Supreme Court, U.S.
FILED
JUN 25 1990
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1989

STEVEN LYMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was sufficient to support petitioner's conviction under 18 U.S.C. 924(c)(1) (Supp. V 1987) for using a firearm in connection with a drug trafficking offense.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is reported at 892 F.2d 751.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1990. A petition for rehearing was denied on February 22, 1990. Pet. App. 11. The petition for a writ of certiorari was filed on April 19, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the District of Minnesota, petitioner was con-

victed on one count of possessing cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). After a bench trial, he was also convicted of using a firearm in connection with a drug trafficking offense, in violation of 18 U.S.C. 924(c)(1) (Supp. V 1987). Petitioner was sentenced to 41 months' imprisonment on the drug possession count, and to a consecutive term of five years' imprisonment on the firearm count. The court of appeals affirmed. Pet. App. 1-10.

1. The evidence at the trial showed that on August 19, 1988, Minneapolis police officers searched petitioner's apartment pursuant to a warrant. They discovered cocaine and cocaine-related paraphernalia in a kitchen drawer and one kitchen cabinet. The same cabinet contained ammunition. The ammunition fit a semi-automatic 9 mm. handgun, which was found in a cloth bag in another kitchen cabinet. The gun was fully loaded, with six rounds of ammunition in the magazine and one round in the chamber. The police found customer records and more cocaine in an adjacent dining area. Pet. App. 2, 14-15, 19-20.

The district court found that the handgun was located in a place that made it quickly and easily available to petitioner; that petitioner had conducted drug transactions in his apartment; that he stored, weighed, and packaged his cocaine in the kitchen; and that petitioner's assertion that he had forgotten about the presence of the gun was not truthful. Pet. App. 14. The district court concluded that petitioner possessed the gun for use "during and in relation to" a drug trafficking crime in violation of Section 924(c)(1), because he had "strategically located the handgun so that it would be quickly and easily available for use during drug transactions." Pet. App. 20.

2. The court of appeals rejected petitioner's claim that there was an insufficient nexus between his possession of the firearm and his drug trafficking offense. Noting that

"more than mere possession is required for a conviction under section 924(c)(1)," Pet. App. 6, the court decided that the critical question is "whether the circumstances indicate 'that the defendant intended to use the gun if a contingency arose or to make his escape,' " *ibid.* The court then approved the standard set forth by the Second Circuit in *United States* v. *Feliz-Cordero*, 859 F.2d 250 (1988), for determining what indicates "use" for purposes of Section 924(c)(1): "Use" is demonstrated if "the circumstances surrounding the presence of a firearm suggest that [its] possessor * * * intended to have it available for possible use during the [drug] transaction," or if "[t]he circumstances surrounding the presence of a firearm in a place where drug transactions take place suggest that it was strategically located so as to be quickly and easily available for use during such a transaction." Pet. App. 7 (quoting *Feliz-Cordero*, 859 F.2d at 254).

Here, the court of appeals noted, the evidence was stronger than that found insufficient in *Feliz-Cordero*. The gun was located in the area of the apartment where petitioner actually conducted his drug trade. All of the drug-related evidence was seized from the kitchen and its adjacent dining area, and petitioner conceded that he had conducted drug transactions in the apartment. Pet. App. 8-10. "Having a loaded gun present in the same area where transactions took place," the court concluded, "makes it more likely that the gun would have been available if needed, and hence that the defendant intended to use it in an emergency." Pet. App. 10. The court therefore affirmed the district court's finding that under the particular circumstances of this case, "the presence and availability of the gun demonstrated intent to use it." *Ibid.*

ARGUMENT

Petitioner's fact-bound claim (Pet. 5-11) that the evidence failed to show a nexus between his possession of the firearm and his drug trafficking offense has been resolved against him by both courts below. It warrants no further review.

As the court of appeals observed (Pet. App. 10 n.4), each case arising under the "use" clause of Section 924(c)(1) turns on whether the facts indicate that "the defendant intended to use the gun if a contingency arose or to make his escape." Pet. App. 6 (quoting S. Rep. No. 225, 98th Cong., 1st Sess. 314 n.10 (1983)).

In this case, there was ample evidence supporting the district court's factual finding. Petitioner, who conceded that he transacted his drug business in his apartment, kept his gun within easy reach of the place where he stored his cocaine (the amount seized had a value of $34,000) and the equipment for weighing, cutting, and packaging it. He stored his ammunition on the same shelf as the cocaine, and he kept the gun fully loaded. Thus the gun, ready to fire, was "in the area that was the center of [petitioner's] drug operations." Pet. App. 19. In addition, the district court found that petitioner had "demonstrated a lack of trustworthiness and veracity" in his testimony about the presence of the gun. *Ibid.* Under these circumstances, the court of appeals was clearly correct in affirming petitioner's conviction.

Contrary to petitioner's contention, none of the decisions he cites would support the reversal of his Section 924(c)(1) conviction. In *Feliz-Cordero*, the Second Circuit agreed with the court of appeals in this case that a sufficient nexus between a firearm and a drug offense would be demonstrated if the defendant "intended to use the gun if a contingency arose or to make his escape." 859 F.2d at 254

(quoting S. Rep. No. 225, *supra*, at 314 n.10 (emphasis omitted). Then, applying the same standard that the court used in this case, the Second Circuit determined that the facts in that case did not demonstrate the requisite intent. See 859 F.2d at 254.

In *Feliz-Cordero*, the police found a large amount of cocaine and cocaine paraphernalia in one apartment where a drug sale had taken place. In another apartment they found a small amount of cocaine, drug records, $11,000 in cash, a beeper, and, in a bedroom dresser drawer, a loaded revolver. No drug sale had been made in the second apartment (although some payment for and discussions about a previous sale had been held there). The court did not determine that drug sales normally took place in the room where the gun was found, nor even that the gun was in the close vicinity of the small amount of cocaine found in the second apartment. As the Second Circuit concluded, "there [was] no basis to conclude that the gun [in a bedroom drawer] would have been quickly accessible if needed." 859 F.2d at 254. In this case, on the other hand, the district court quite reasonably concluded that the gun was strategically placed for quick access. Pet. App. 20.

Nor does *United States* v. *Theodoropoulos*, 866 F.2d 587, 595-598 (3d Cir. 1989), aid petitioner. There the conviction depended on a finding that three firearms found in a trash can on the porch outside the defendant's apartment were used in connection with the narcotics conspiracy. There was no finding that the apartment had been used as the location for drug sales, although it was the home of persons involved in drug transactions and served as a storage place for drugs. Like both the Second Circuit and the court in this case, the Third Circuit in *Theodoropoulos* expressly approved the *Feliz-Cordero* standard for determining whether a gun was "used," see 866 F.2d at 597; the Third Circuit, like the Second Circuit in *Feliz-Cordero*,

simply determined that the test was not met on the facts of that case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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JUNE 1990

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